No. 4252

In the United States

Circuit Court of Appeals

For the Ninth Circuit

WILLIAM L. SCRIBNER, ALICE SCRIBNER, and LOTTIE POWELL,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HON. JEREMIAH NETERER, *Judge.*

BRIEF OF PLAINTIFFS IN ERROR.

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4253

No. 7795

WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

STATEMENT OF CASE.

On July 6, 1923, the appellant, ALICE SCRIBNER, was, and for sometime previous heretofore had been, operating a certain lodging house in Seattle,

known as the Star Rooms, located on Second Avenue. (Tr. p. 50). The appellant, William L. Scribner, is the husband of the said Alice Scribner and previous to July 6, 1923, lived at the said Star Rooms with his wife in a separate and distinct apartment, and was not connected with the management or ownership of the Star Rooms, being then engaged as part owner and manager of the Bungalow Cafe in another part of the city, (Tr. p. 106) and on the said 6th day of July, 1923, and for approximately a year and a half previously, Vera Harper had roomed in the said Star Rooms, and was engaged in the dressmaking business. (Tr. p. 91). On the evening of July 6, 1923, the appellant, Lottie Powell, was present in the said Star Rooms, (Tr. p. 92), and about 5:30 P. M., J. A. Simmons and W. M. Whitney, federal agents, visited the Star Rooms and purchased from Vera Harper certain intoxicating liquors. The appellant, Lottie Powell, was present and was arrested with Vera Harper after the purchase, (Tr. p. 92). The agents arrested Alice Scribner in an adjoining room and then proceeded to the third floor occupied exclusively by Scribner and wife, and placed him under arrest. There was no proof of any coercion or participation by William Scribner in the sales or possession, and William Scribner was not present during any of the transactions. (Tr. p. 71).

An Information was filed by the United States Attorney for the Western District of Washington, charging the appellant in four counts with certain violations of the National Prohibition Act. (Tr. p. 1). The witnesses for the Government were excluded. (Tr. p. 9).

During the progress of the trial, one of the witnesses, produced on behalf of the Government, W. M. Whitney, testified in regard to the Star Rooms, that certain rooms therein located were "serving rooms" and a motion was then made in behalf of all the appellants that the testimony of the witness to the effect that these rooms were serving rooms be stricken, which motion was by the court denied and to which ruling an exception was duly noted. (Tr. p. 67).

That J. A. Simmons, a witness produced on behalf of the Government, testified that shortly after the appellants Lottie Powell and Alice Scribner were placed under arrest, Mr. Whitney went upstairs and that Mr. Whitney remained upstairs for approximately one-half hour and that about five minutes after Mr. Whitney went upstairs the said witness himself went upstairs alone. (Tr. p. 62). Mr. Whitney testified that shortly after the appellants, Lottie Powell and Alice Scribner were placed

under arrest he went upstairs, remained there a short time, having placed Mr. Simmons in charge of said appellants and that he then came downstairs, placed the appellants in charge of other prohibition agents who had arrived and that he took Mr. Simmons and Mr. Justi, a federal prohibition agent, and the three of them thereupon went upstairs and conducted a search. (Tr. p. 71). Mr. Justi was called as a witness on behalf of the Government and in direct examination for the Government testified that he was at the Star Rooms on July 6th, 1923, and assisted in searching the building and testified regarding a bottle of beer that he found in the icebox on the upper floor and that on cross-examination the said Justi testified that he made a careful search of the kitchen on the upper floor and also testified that Mr. Whitney came in the kitchen just about the time he opened the icebox and found the bottle of beer and testified that he and Whitney were alone when he found the beer (Tr. p. 88) and thereupon during the cross-examination of said witness, Justi, the following occurred:

Q. Who accompanied you down to the Star Hotel?

MR. McKINNEY: I object to that as not proper cross-examination.

THE COURT: Objection sustained.

Q. One more question, Mr. Justi. Was Mr. Simmons upstairs with Mr. Whitney?

MR. McKINNEY: I object to that.

THE COURT: Objection sustained. He has already answered that question.

MR. BEELER: Exception.

Q. Was Mr. Whitney the only one that was with you?

MR. McKINNEY: I object for the same reason.

THE COURT: He has answered the question before.

MR. BEELER: Exception. (Tr. p. 89).

At the conclusion of the Government's case, Vera Harper, who was one of the defendants, withdrew her plea of not guilty to counts one, two and three of the Information and entered the plea of guilty to counts one, two and three of the Information.

Upon the conclusion of the trial, the jury returned a verdict of not guilty as to all the defendants on count four of the Information and a verdict of guilty against the appellants on the first three counts of the Information.

After the jury had returned verdict of guilty against the appellants on the first three counts of

said Information and a verdict of not guilty on count four thereof and within the time limited by law, under the rules of the court, the appellants, William L. Scribner and Alice Scribner, moved in arrest of judgment, which motion was denied by the court and to which ruling the said appellants duly excepted. The motion was based upon the provisions that the verdict of the jury was inconsistent in that the finding of appellants guilty on counts one, two and three of the Information could not stand with the jury finding the said defendants not guilty on count four of said Information for the reason that the same transaction, the same facts and the same evidence was relied upon by the Government in seeking conviction under count four as under counts one, two and three and if guilty of possession or sale, the appellants must necessarily have been guilty of maintaining a nuisance and even guilty of maintaining a nuisance they were not guilty of possession and sale. (Tr. p. 14).

After the return of the verdict by the jury and within the time limited by law, the appellants moved the court for an order granting to them a new trial, which motion was denied and to which ruling an exception was duly noted. (Tr. p. 16).

ASSIGNMENTS OF ERROR.

1. The verdict as to William L. Scribner is contrary to the evidence and the law.

2. The court erred in not striking and taking from the jury the conclusions of the witness, Whitney, that certain rooms were "serving rooms."

3. The court erred in denying the appellants the right to cross-examine the witness, Walter M. Justi.

4. The court erred in overruling appellants' motion for a new trial.

5. The court erred in overruling the appellants' motion in arrest of judgment.

ARGUMENT.

The argument of the appellants will be grouped under five different points, to correspond with the assignments of error hereinabove set forth.

The first assignment of error relates to the verdict as to William Scribner. The Government's conviction of William Scribner must rest, if at all, upon his position as a principal in the case at bar. The testimony of the Government's witness most favor-

ably construed, in no direct way connects Scribner directly with the sales. The agency of the crime, therefore, must extend from Vera Harper and Lottie Powell to Alice Scribner. There is no admission made by Scribner, his wife, or the two women, which make him a principal or in any way a participant. The marked money and other evidence of the violations were found on Alice Scribner, Lottie Powell, or Vera Harper. No one will contend that the mere presence of William Scribner, or anyone, at a crime, will make him a party to it unless he participates. If we make the crime of the wife, assuming her guilt, the crime of William Scribner, we will find that we are making an actual commission of a crime by two roomers of a rooming house, the crime of the landlady and proprietress, and then by the mere fact of marriage, the crime of her husband. We are enlarging the criminal responsibility of a husband for the wife's actions to include her agents. From common law there has come down a doctrine of the coverture of the wife, being a shield, under which her husband must suffer for her derelictions. This rule of law was at one time sound, but today with the separate status of the wife defined and established, and her rights independent of her husband fixed, it hardly seems a safe or just rule. This separate entity of the wife has reached its full limits

in the State of Washington where women have the same status before the law as men. Remington's Compiled Statutes of Washington provide, under Section 6901-6902 that the Civil disabilities of the wife are abolished, and that married persons may acquire and hold property as if they were unmarried, and that contracts made by the wife, and liability incurred, may be enforced by or against her to the same extent and in the same manner as if she were unmarried. It is not illogical, therefore, to ask this court, in view of the liberality of the State in which the parties are domiciled, to say that married women must now stand alone in criminal responsibility. We have been unable to find in our search any decisions holding the husband responsible for the acts of the *wife's agents.*

A review of the law in this regard is instructive:

> "It is generally held that the husband is not liable for the wife's violation of the liquor laws committed out of his presence and *without his command or consent.*" *33 C. J.* 608.

> "If a married woman commits such an offense of her own free will, not in the presence of her husband, and independent of any coercion or control by him, she herself is criminally liable and he is not." *33 C. J.* 608.

Bailey vs. Commonwealth, 29 Ky. L. 105, 92 S. W. 545, where the husband was convicted for sale

made by his wife, and not shown to be with his knowledge and consent. Chief Justice Hobson stated:

> "The court on this evidence should have instructed the jury peremptorily to find for the defendant. He was not responsible for what his wife did in his absence and without his authority."

Another case is *Pennybacker vs. State.*

> "The presumption of agency is inadmissible. The wife committing offenses without the presence or coercion of her husband is regarded as a *femme sole*—she alone is responsible." *2 Bl.* 484 (Ind.); *1 Chittys Blackstone,* 348.

> "A husband is not liable criminally for his wife's offenses unless he aids, procures or acquiesces in their commission."

> *Lupker vs. Atlanta,* 9 Ga. App. 470, 71 S. E. 755.

Again

> "At common law a wife was not guilty of crimes committed in her husband's presence except treason or murder, but was guilty of those committed in his absence as a crime committed by a wife in the husband's presence was *prima facie* presumed to be the result of his coercion. * * * The modern married women's acts, however, tend to give married women a separate entity for criminal as well as other purposes." *Schouler Domestic Relations* 1921, Sec. 56.

See also:
Mills vs. State, 18 Neb. 575, 26 N. W. 354;
Seibert vs. State, 40 Ala. 60;
State vs. Baker, 71 Mo. 475;
Commonwealth vs. Gormley, 133 Mass. 580;
State vs. Mafoo, 110 Mo. 7, 19 S. W. 222;
Also *30 C. J.* 794 with citations.

We are, therefore, in this case asking that the Government in its prosecution for the violations of the National Prohibition Act, in the State of Washington, be limited to including husbands only in those cases where the husband has concurred or participated in, or approved, the wife's illegal sales, and we are further asking the court to hold that the wife's agents cannot bind the husband by their actions. Otherwise the logical result of such proceedure would be the establishment of an endless chain which finds its source only in the marriage of the husband and makes him involuntarily responsible for every action done by his wife through agents or representatives. We are asking this court to decide that the acts of Vera Harper and Lottie Powell cannot be in law the actions of William Scribner when no connection has been shown with him.

The second assignment of error relates to the court's refusal to strike the testimony on direct examination of W. M. Whitney, to the effect that

the premises occupied by the appellants contained "four serving rooms," although the court instructed the jury, after denying the motion to strike the testimony, that "the jury will not be bound by his (Whitney's) conclusions as to what the rooms were. He simply defined the rooms; let the jury conclude what they were used for." In that instruction, it can be seen that the court ruled the conclusion of the witness should go to the jury because after refusing to strike the same the jury were told that the witness was "simply defining the rooms" and the court finally stated, "There is testimony here with relation to the arrangement of these rooms. The witness on the part of the Government called them serving rooms and they testified the way in which these rooms were fixed up." This instruction was highly prejudicial to the appellants and, even though they were defending themselves on a charge of violating the liquor laws, it is respectfully submitted that they were entitled to have the Government establish its case by the same rules governing the admissability of testimony as applied in the trial of other criminal charges. It cannot be successfully claimed that the finding of the jury under the first three counts of the Information was not largely a result of this incompetent testimony and conclusions of the witnesses and the statement of the trial court.

For years it has been an "elementary proposition of law that a witness must state facts and not his opinions or conclusions." (*16 C. J.* 747.) The case of *State vs. Dushman,* 91 S. E. 809, held:

> "Opinion evidence, should only be admitted after the witness has detailed all the facts and circumstances to the jury and if these can be placed before the jury, and they are of such a nature that jurors generally are just as competent to form an opinion in reference to them, and to draw inferences from them, as the witness, then the opinion of the witness should not be admitted."

The case of *Jones vs. State,* 32 So. 793, held:

> "The opinion of a witness, except as to a matter regarding which expert testimony is competent, is not legitimate evidence as to any matter that may be reproduced before the jury."

The case of *State vs. Morris,* 83 Ore. 429, held:

> "When the matter under consideration before a jury is of such a character that anyone of ordinary intelligence, without any peculiar habits or courses of study, is able to form a correct opinion of the same, expert testimony as to such matter is inadmissible."

And the case of *Barnes vs. State,* 133 S. W. 887, held that an opinion deduced from physical facts, which can be detailed to the jury is inadmissible.

There is another reason why this testimony should be disapproved. It is permitting the prose-

cuting witness to present to a jury not facts, but prejudiced opinions, and permitting a jury to hear from a witness his suspicions and conjectures rather than the truth. It has been said that a zealot is a cousin of a harlot, and testimony that comes from a prejudiced source and his opinions thereon, are opinions of a zealot. The principles of proceedure and constitutional guaranties will not last long if the prejudices of witnesses are introduced into inquiry and juries misled thereby.

It is the contention of appellants under the third assignment of errors, that serious injustice was done them in not allowing the cross-examination of the witness Justi, on important and material matters. The testimony of the Government's witnesses, Simmons and Whitney, was directly opposite regarding the search of the third floor of the Star Rooms, the arrest of the appellant, William L. Scribner, and the discovery of certain liquor in his room. The Government, of course, as can be seen from the bill of exceptions herein, had not made a case against Scribner and in order to have any proof, it was very vital to show the presence of liquor in Scribner's room. It was strenuously urged throughout the trial that it was most peculiar that the testimony of the Government agents was contradictory on this one point, viz: on the finding of the liquor in William

L. Scribner's room. Whitney's testimony, regarding the search of upstairs portion of the Star Rooms was altogether different from that of Agent Simmons, and in addition thereto, Whitney testified that he and Simmons and Justi all went upstairs together and participated in the search. Now the court in passing on the appellants' motion for a new trial when this particular point was urged in overruling the same, states:

> "The fullest cross-examination of Justi was permitted within the rules of evidence. Cross-examination is for the purpose of testing the truthfulness, intelligence, memory, bias or interest of a witness and any question to that end and within reason was here allowed. The most strenuous argument is presented to the court's ruling, declining to permit Justi to be examined with relation to Whitney and Simmons testimony for the purpose of discrediting it. This claim was improper."

But the Honorable District Court, in so ruling, looks at the proposition from a prosecution viewpoint. It is true that had the court allowed the cross-examination desired by the appellants of the witness Justi, there might have been something disclosed that would have discredited the testimony of Whitney or Simmons, or both of them, or it might have shown irreconcilable contradiction which would have discredited the entire testimony in the mind of

the jurors. This is merely a present-day application of the biblical rule of "Susannah and the elders" and the "false in one, false in all" rule. The Honorable District Court states the rule that "cross-examination is for the purpose of testing the truthfulness of a witness," but refused to apply it.

The witness Justi, in direct examination testified that he was upstairs making a search of the premises and the court in its ruling on the cross-examination refused to allow the appellants the right to bring out all features of that transaction, viz, how the witness got there, who was upstairs with him, whether Whitney or Simmons was there and whether or not he, Whitney, and Simmons were all there together. This, it is the contention of the appellants, was reversible error, according to the decisions.

> "It was permissible on cross-examination to bring out other features of the transactions, a part only of which had been disclosed by the testimony elicited, by direct examination of witness." *Hardy vs. U. S.*, 256 Fed. 284 at 286.

> "A fair and full cross-examination of a witness upon the subject of his examination in chief is the absolute right and not merely the privilege of the party against whom he is called and a denial of this right is a prejudicial and fatal error." *Resurrection Gold Min. Co. vs. Fortune Gold Min. Co.*, 129 Fed. 668 at 674.

"It is no answer to a refusal to permit a full cross-examination that the party against whom the witness is called might have made him his own witness, and might then have proved by him or by some other witness, or by some writing, the facts which the cross-examiner was entitled to draw from the testimony of his adversary's witness. No one is bound to make his adversary witness his own to prove facts which he is lawfully entitled to establish by the cross-examination of that witness. The testimony given by a witness on his cross-examination is the evidence of the party in whose behalf he is called and the cross-examiner has the right to bind his adversary by the truth elicited from his own witness. *Wilson vs. Wagar,* 26 Mich. 457, 458; *Campau vs. Dewey,* 9 Mich. 417, 418; *Chandler vs. Allison,* 10 Mich. 460, 473; *New York Mine vs. Negaunee Bank,* 39 Mich. 644, 660. A full cross-examination of a witness upon the subjects of his examination in chief is the absolute right, not the mere privilege, of the party against whom he is called, and a denial of this right is a prejudicial and fatal error. It is only after the right has been substantially and fairly exercised that the allowance of cross-examination becomes discretionary

"Statements in the opinions of courts are called to our attention to the effect that the limit of cross-examination is discretionary with the trial court, but it is only discretionary without the limits of the right of the party against whom a witness is called to a full and fair cross-examination of him upon the subjects of his direct examination, and the right of the party in whose behalf he testifies to restrict his cross-examination to the subjects of his direct examination." *Harrold vs. Territory of Oklahoma,* 169 Fed. 47 at 51.

Assignment four is the identical matter set forth in points one and two and the court's ruling on said points one and two should be the court's ruling on point three.

Assignment Five. Under count four of the Information the defendants could have been convicted either or maintaining a common nuisance or of selling intoxicating liquor on July 6th, 1923, (*Sanlin vs. United States,* 278 Fed. 170). So, therefore, the verdict of not guilty under count four was not only a verdict of not guilty of maintaining a common nuisance but also a verdict of not guilty of selling intoxicating liquors on July 6th, 1923, and was inconsistent with the verdict of guilty under count three of selling intoxicating liquors on July 6, 1923, provided both counts three and four related to the same transactions; that they related to the same transaction affirmatively appears from the records in the case, the supporting affidavit of W. M. Whitney, filed with the Information setting out a charge that the appellants were on the 5th day of July possessing intoxicating liquors and also, on said date, sold intoxicating liquors and on the 6th day of July sold intoxicating liquors, concludes with this statement: "That by reason of the facts hereinabove set forth the said William L. Scribner, Alice Scribner, Lottie

Powell, alias Lottie Lynn, and Vera Harper, on the said 6th day of July, 1923, at said 201½ Second Avenue South, in the city of Seattle, conducted and maintained a common nuisance'' and the testimony and evidence introduced shows that the conviction of the appellant under count four was sought by the Government solely by reason of the facts upon which the conviction was sought under the other three counts of the Information.

> ''This court has previously held that a verdict of guilty on one count and not guilty on another count, which second count embraces the first count is inconsistent and cannot stand.'' *Rosenthal vs. U. S.,* 276 Fed. 714.

And this court has also decided that a charge of selling intoxicating liquors is embraced within the charge of maintaining a common nuisance. *Sanlin vs. U. S.,* 278 Fed. 170, and this court has also held that in an information containing two counts, one charging the unlawful possession of liquor and the other the maintaining of a common nuisance, if the two counts related to the same transaction, a verdict of guilty under the first count and not guilty under the second would be inconsistent and could not stand, citing the *Rosenthal* case *supra.* It is respectfully submitted here that it cannot be maintained that count four of said Information did not

relate to the same transaction set out in counts one, two and three.

It is an elementary proposition of law that no form of verdict will be good which creates a repugnance or absurdity in the conviction, *2 Bishop's New Criminal Proceedure,* Section 1015 (5). The point raised here is the identical point passed upon in the case of *Kuch vs. State,* 99 S. E. 622. In that case the defendant was charged in two counts. First, with the offense a misdemeanor for selling spiritous liquors, and, then, with the offense of misdemeanor for having, controlling, and possessing spiritous liquors. The jury rendered a verdict finding the defendant guilty on the first count and not guilty on the second count. The matter was before the court for consideration on a motion in arrest of judgment on the ground of repugnancy in the verdict. The court in its opinion referred to *2 Bishop's New Criminal Proceedure* cited above, and held:

> "The offense of having, controlling and possessing spiritous liquors in this state as alleged in the second count could be committed without making a sale of the spiritous liquors; but the offense of selling which contemplates delivery within the meaning of the prohibition statutes as the culminating feature of the sale * * * could not have been committed without having or controlling or possessing liquor. There would be no inconsistency or repugnancy in a verdict of

> guilty under the second count and not guilty under the first count. But there would be inconsistency and repugnancy in a verdict of guilty under the first count and not guilty under the second count."

The court also cites the case of *Commonwealth vs. Haskins,* 128 Mass. 60, which held:

> "Upon trial on an indictment charging the defendant in one count with larceny of a chattel and in another count with receiving the same chattel knowing it to have been stolen a verdict of guilty on both counts is inconsistent with law and no judgment can be rendered upon it."

This principle was considered in the case of *State vs. Headrick,* 78 S. W. 630. Which case held that a verdict of not guilty on the first count of an indictment charging the defendant with an assault with a deadly weapon, with intent to kill, was inconsistent and repugnant with a verdict of guilty on the second count charging defendant with making an assault with a knife and cutting and disabling the same person with intent to kill.

It is true that in the case of *Bilboa vs. U. S.,* 287 Fed. 125, decided by our Circuit Court of Appeals, held that acquittal on a count alleging nuisance does not invalidate a conviction for an unlawful possession or sale. But examination of this case discloses that the matter really decided is not con-

trary to the principle in cases heretofore cited and discussed. This case simply held:

> "It is claimed, however, that the effect of the finding of the jury that the defendants herein guilty of the charge of maintaining a common nuisance, by keeping in the building intoxicating liquors for sale is, in effect, an acquittal of the charge of possession and sale in such premises; but such is not the *necessary* result."

This holding is not inconsistent with the proposition that the "necessary result" would have been otherwise had the evidence shown that under the charge of maintaining a common nuisance the Government sought conviction by the same evidence and testimony that was necessarily introduced to obtain a conviction under the other counts of the Information.

> "The safest general rule to determine identity is that the two offenses must be in substance precisely the same or of the same nature or of the same species, so that the evidence which proves the one would prove the other; or if this is not the case, then the one crime must be an ingredient of the other." *16 C. J.* 264, Sec. 444. *Grey vs. U. S.,* 172 Fed. 101; *Wilcox vs. U. S.,* 161 Fed. 109; *Berkowitz vs. U. S.,* 93 Fed. 452; *U. S. vs. Three Stills,* 47 Fed. 495; *U. S. vs. Nickerson,* 15 Law Ed. 219; *Ryan vs. U. S.,* 216 Fed. 13; *Stone vs. U. S.,* 64 Fed. 667.

A prosecution for keeping intoxicating liquors for sale between certain dates will bar a subsequent prosecution for a sale within such dates.

State vs. Lesh, 145 N. W. 829.

A conviction of being a common seller of intoxicating liquors is a bar for a single sale within the same time upon ground of a merger.

Com. vs. Mead, 10 Allen (Mass.) 396;
Com. vs. Jenks, 1 Gray (Mass.) 490.

> "Where the facts constitute but one offense; although it may be susceptible of division into parts, a prosecution for any part bars a further prosecution based upon another part." *16 C. J.* 279.

The argument of the inconsistency of the verdict applies with particular force to W. L. Scribner for the reason that the jury found him "not guilty" of maintaining or assisting in maintaining the Star Rooms where liquor was sold or kept for sale, and the only possible theory on which he could have been included herein was because of his connection with the place or his marriage relation with the proprietress. The law must be enforced, but its enforcement becomes ridiculous when the suspicion of agents can convict a man and a jury can return a verdict which frees him from the charge of con-

ducting a place where liquor is sold and convict him of sales in which he did not in any way participate.

In concluding a lengthy brief we reiterate that the verdict is inconsistent, that the defendants have been denied substantial rights and that the conviction of William L. Scribner is a "threadbare verdict." The enforcement of law is a splendid ideal, cherished by Americans, but it can never be completely realized until prosecuting officers are held within constitutional limitations and verdicts are rendered based upon intelligent consideration of the facts.

Respectfully submitted,

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